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No. FD09P00033

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

Friday, 30 November 2018

Before:

MR JUSTICE HOLMAN

(**In Public**)

B E T W E E N :

MG — Applicant

- and -

JH — Respondent

MR P. PAISLEY (instructed by MT UK Solicitors) appeared on behalf of the applicant.

MR M. EDWARDS (instructed by Dawson Cornwell) appeared on behalf of the respondent.

J U D G M E N T

(As approved by the judge)

MR JUSTICE HOLMAN:

1 I have not been able to speak to the CAFCASS Guardian office. I have tried again but I just receive a pre-recorded message saying, "Please leave your contact details and we'll ring back" and I cannot wait longer for them to ring back. So I have not spoken to the office, so I do not actually have any knowledge of the availability or otherwise of Ms Jolly. Assuming she is available, in my view it is correct, and appropriate, in this case, that she, who was previously the guardian, should be reappointed. I do not pretend that she will necessarily have any deep recollection of this case, but it does, of course, have certain striking features and when she reads back into it, aspects of it will no doubt come to mind.

2 The main objection put forward on behalf of the mother is that in 2013 Ms Jolly made a recommendation which ran counter to the child's own expressed wishes. The child at the time was saying that she would prefer to return to live in Mexico. That does not seem to me to be any reason at all for not reappointing the guardian. Guardians have to be independent-minded. It is the duty of the guardian to ascertain, and faithfully report, the wishes and feelings of the child concerned, but then to make objective recommendations as to what, in the view of the guardian, is in the child's best interests. So it could not possibly be a disqualifying reason.

3 Further, the child at that time was only aged about six or seven. She is now considerably older and, frankly, Ms Jolly, if she does become the guardian, will be making a fresh start with the child as she now finds her. Further, history has shown that the actual recommendation made by Ms Jolly was a wise one. It was implemented, and the mother's own case is that she herself has become very happy and settled here in England. So I cannot see any justifiable or rational basis for saying that Ms Jolly should not be the guardian. Ordinarily, once a CAFCASS officer is in place in a case, he or she remains with that case unless there is a solid, objective reason for requiring that a different guardian be substituted.

4 So, for those reasons, I rule that the wording of the order will say that the child be represented by a guardian allocated by CAFCASS, but adding, "If possible, the former guardian, Ms Toni Jolly".

[**LATER**]

5 This case was listed before me this week with two days allowed for a so-called "final hearing". In the event, the present hearing has been inconclusive and this matter will be further considered by the court (and by myself, if available) for further directions on 18 March 2019 and for final hearing on 1 and 2 July 2019.

6 The purpose of these few words is not to serve as a formal judgment and, in particular, not to adjudicate on the issues between the parties. Rather, it is a brief narrative of where we have got to in this case. There are two main purposes for that. The first is as a reminder, or aide memoire, to me and others when the case is later restored. The second is to give some framework to CAFCASS, whom I am reappointing as guardian in this case.

7 The child concerned is now aged about 12 and a half, having been born in June 2006. The background is, of course, very well known indeed to both parties, and to everyone in the courtroom, and indeed, in a generic way, to CAFCASS, who were previously involved as guardian. A full account may be obtained in the judgment of Macur J, given in October 2012.

8 In a very few sentences, the mother herself is Mexican. Her parents and most, if not all, other close members of her family were living in Mexico and (save for her mother, who has since, sadly, died) continue to do so. In 2008, when the child was about 18 months old, the parents and child travelled to Mexico for what was intended to be, and understood by the father to be, simply a short holiday to the mother's homeland. In the event, the mother retained the child there. As fully described in the judgment of Macur J, and indeed also in

the guardian's report by Ms Toni Jolly from September 2013, it took the father a monumental struggle over the next four years to recover his daughter to England.

9 It is absolutely clear that, in that period, the mother acted with great deliberation and also deception. At this hearing she has said that, during those four years, she moved address at least 10 times. She was very deliberately concealing the whereabouts of the child from the father. The mother resorted to every possible legal manoeuvre in Mexico to prevent or delay the return of the child, including making a number of Amparo applications.

10 Eventually the child was returned and has lived here in England since 2012. She lives under a shared residence arrangement. She spends rather more of her time with her mother than with her father, but sees a good deal of both parents. It is perhaps not surprising that, on the father's own account, there are still tensions and difficulties in the relationship between the child and himself; but, speaking very generally, the overall conflict and tension here seems to have diminished with the passing of time. The mother says that she has formed a new and permanent relationship with an English man (Mr D W) who has been present throughout this hearing and gave oral evidence yesterday. On the face of it, he appears to be deeply rooted in England, where he has lived all his life and always worked, and where he has two children of his own.

11 So some years have now passed and the mother now applies for permission to take the child on a holiday to Mexico. She says, in particular, that her father, who is now aged 73 and, as I have said, is now the only surviving Mexican grandparent, suffers various medical conditions such that he cannot realistically travel again to England. Therefore, she says, the only possibility of the child meeting her grandfather again face to face is if she, the child, travels to Mexico. Of course, the mother wishes herself to be able to see her father, but she has in the intervening years been to Mexico without the child and is, of course, completely

free to go any time she wishes to Mexico. The question, therefore, is whether or not the child should be permitted to accompany her.

12 I wish to say very clearly that this application by the mother is, from her point of view, an eminently reasonable and justifiable one to make. Further, if one could be certain of the safe and prompt return of the child from Mexico, it is likely to be very much in the best interests of the child to be able to make a trip, or trips, to Mexico. It does, after all, represent half her dual heritage. She has her grandfather and many other relations living there and, in principle, it can only be enriching for her to be able to experience life in Mexico and meet those people at firsthand.

13 The risk, however, is that of non-return. As is well known in situations such as this, the court first has to make a judgment about the magnitude of harm that might result to the child if he or she is not returned at the end of the proposed trip. Quite frankly, in the present case, and having regard to the earlier history, it could truly be described as "catastrophic" for the child if she were now to travel to Mexico and be retained there again, with all the resulting damage to her still developing relationship with her father. Second, the court has to assess the magnitude of risk of non-return. Third, and tied in with that, the court has to assess the extent to which that risk can be removed or minimised by case specific safeguards.

14 The case of the mother is that she is now in a very different "place" than she was in 2008 and up to 2013. She says that she is now in a settled relationship with Mr W, his life is here and, therefore, her life with him is here. She says that she has trained for, and now is in, settled, good employment here. She asserts that she has absolutely no thought or intention at all of again retaining the child in Mexico.

15 There is, however, a history, and the history is one of great deviousness by this mother after she was already an adult person. It is possible that, even in making this application, she has

a concealed plan or intention once in Mexico to keep the child there. But even if she makes the application in good faith, and with sincerity, there is a risk that once in Mexico she might be subjected to pressures upon her to which, as before, she might yield. It is, frankly, impossible to say in this case that there is no risk at all of this child being retained in Mexico. On the other hand, if children were only allowed to travel abroad in situations of certainty that they would not be retained abroad, many children would be denied enriching travel opportunities. So in almost every case some degree of risk has to be taken. I do not at this hearing, or by this judgment, express any view as to the actual level or degree of risk, but do say that patently there must be some level of risk.

16 There has been oral evidence at this hearing from the jointly instructed expert, Mr Garcia. I do record in this judgment that I was impressed by Mr Garcia as a witness. He practises in Mexico but gave evidence by videolink from Spain, where he happened to be. He speaks very good English. He was a very good and clear witness who demonstrated obvious expertise both in relevant Mexican law and procedure and also in the law and procedure of the Hague Convention. In my view, his evidence was appropriately objective and not in the least partisan to either parent. He has described, both in his written reports and also elaborated upon in his oral evidence, steps which would require to be taken, and may be taken, in Mexico in order to minimise the risk of non-return and to provide very clear safeguards if the mother was even to attempt to retain the child there. These include the obtaining of an appropriate mirror order, which would require to be extremely carefully drafted, and also completely expunging the so-called Mexican agreement which was recorded between the parties in 2012. Pursuant to that agreement, the child is in fact to live in Mexico, albeit to spend periods of time here in England with her father. It is, frankly, inconceivable that I or any English court could possibly allow this child to travel to Mexico, against the background history of this case, whilst that Mexican agreement remains in existence in any shape or form.

17 So very significant steps require to be taken in Mexico. There will also in this case undoubtedly be a need for an appropriate amount of money to be put up in some form of a bond, so as to be available for immediate use by the father as a fighting fund if he did have to travel to Mexico and/or seek legal remedies there. I do not today put any figure on that, save to say that it will have to be considerably higher than the US $5,000 which is currently offered by the mother. Mr Garcia estimated that at least US$20,000 would be required, and on top of that the father would, in my view, undoubtedly have to travel to Mexico and incur travel and other expenditure there. As a matter of record, in the four years between 2008 and 2012 he claims to have spent over £100,000 in struggling to recover his daughter.

18 So a significantly higher sum than $5,000 will be required and, frankly, if the mother is ever to be able to take the child to Mexico, she will have to go to one or more of her family members and borrow those sums. It should be stressed that provided the child is promptly returned from any visit to Mexico, then, of course, the money will be promptly returned to the mother and she in turn can return it to any family member from whom she has borrowed it.

19 There is another aspect of this case which stands in the way of my resolving it at this hearing. It is absolutely clear that other members of the mother's family, and in particular her father, were deeply implicated in the retention between 2008 and 2012. Her father clearly gave to her emotional or moral support, practical help and financial support. So far as I am concerned, it is inconceivable that this child can now travel to Mexico, where the mother's father continues to live, without the court itself first hearing live (but by videolink) from the father.

20 There are final, linked reasons why, in my view, this case is not capable of resolution at the present hearing and why I cannot make some abstract order granting permission to take the child to Mexico, subject to certain conditions. The earliest time when, realistically, the

mother can travel to Mexico is the school summer holidays, which are some seven or eight months away. It seems to me that a great deal may pass between now and then in all sorts of possible ways, and in those circumstances it is quite wrong to make some abstract decision at this relatively early stage.

21 Linked with that is consideration of the wishes and feelings of the child herself. I stress that the wishes and feelings of the child are in no sense whatsoever decisive upon this application. She is, after all, aged only 12 and a half to 13, and in no position, for instance, to make any evaluation of the risk of non-return. But her wishes and feelings are relevant. They are relevant because they are expressly referred to in section 1(3) of the Children Act 1989. They are also relevant because it seems to me that when deciding whether or not to take some risk in relation to a child, the court needs to know how strongly the child herself wishes to do the thing in point. There is clearly a spectrum. This child might at one end of the spectrum be rather neutral or lukewarm about travel to Mexico. If that were so, then it seems to me that it would not be justifiable to take even a low risk of non-return. At the other end of the spectrum, she may be desperately keen to travel to Mexico. If that were so, then it may (I stress "may") be that some higher level of risk has to be taken, lest the child becomes deeply thwarted and frustrated in her own genuine desires.

22 So, although I perfectly respect the decision of Cohen J last June not to order any kind of section 7 inquiry into the wishes and feelings of this child in relation to travel to Mexico, it has become very clear to me during the present hearing that they must be ascertained. She was previously represented by a CAFCASS guardian, who was Ms Toni Jolly. It seems to me that there is great conflict still between the parents on this application. There may be some very difficult decisions which have to be taken. All those decisions require to be illuminated (although not in any way determined) by consideration of the child's own wishes

and feelings and, importantly, the extent to which those wishes and feelings are authentically her own or have been influenced by others.

23 For those reasons, it is very clear to me that I should, as I do, now reappoint CAFCASS as guardian. It seems to me entirely appropriate that, if she is available, Ms Toni Jolly should once again be the allocated guardian, although ultimately that is a matter for CAFCASS to decide. So for all those reasons, I now adjourn this matter on the basis of terms which have been very carefully worked out and drafted by counsel during the course of today and which are, I hope, self-explanatory.

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This transcript has been approved by the Judge (subject to Judge's approval)